A **JAGDIS SINGH BANTA SINGH & ANOR v. RETURN 2 GREEN SDN BHD**

COURT OF APPEAL, PUTRAJAYA
LAU BEE LAN JCA
RAVINTHRAN PARAMAGURU JCA
B MOHD SOFIAN RAZAK JCA
[CIVIL APPEAL NO: W-02(IM)-1101-06-2019]
16 DECEMBER 2020

C ***COMPANY LAW:*** *Liquidators – Application for removal – Allegation that liquidator acted unfairly by giving preference to one creditor – Whether prior leave of court required for removal – Whether removal ought to be for benefit of all creditors – Whether reasonable to obtain support of all creditors and contributories to remove liquidator – Whether liquidator may be removed only on 'cause shown' – Whether liquidator's impartiality and objectivity in conduct of duty questionable*
D *– Whether ought to be removed – Companies Act 2016, s. 482(2)*

The appellants filed an application under s. 482(2) of the Companies Act 2016 ('Act') to remove the liquidator of Return 2 Green Sdn Bhd ('R2G'). The company was wound up on 14 September 2012 at the instance of TSLK Enterprise Sdn Bhd ('TSLK'). The appellants claimed that they were the
E creditors of R2G and that the liquidation was not being conducted fairly with a view of recovery of the assets of the company for the benefit of its creditors. Instead, the liquidator acted to assist TSLK to gain control of the only valuable asset of the company, a machinery. The High Court dismissed the application, not on the merits of the application, but on the ground that the
F other creditors and contributories did not support it. The High Court also did not deal with the issue of whether the appellants were creditors. Hence, this appeal. The main issues that arose were: (i) whether leave of court was required for the removal of a liquidator; (ii) whether support of all creditors and contributories was obligatory; (iii) whether the appellants were creditors;
G and (iv) whether cause shown on the merits for removal of creditor. At the outset of the hearing, the liquidator raised a preliminary objection to the appeal that leave of court was not obtained for the application to remove the liquidator.

**Held (allowing appeal; setting aside order of High Court)**
H **Per Ravinthran Paramaguru JCA delivering the judgment of the court:**

**(1)** The application to remove the liquidator was made under s. 482 of the CA. There was no pre-requisite of prior leave of court stipulated in the provision. The court in *Kao Che Jen v. N Chanthiran Nagappan* held, *inter alia*, that the legislative intent of s. 232(1) of the Companies Act
I 1965 ('CA 1965') is to confer specific power to the court to remove the liquidator and impose on it the duty to exercise the said power only on cause shown. Hence, the preliminary objection was without merit. (paras 7, 9 & 10)

**(2)** Section 482(b) of the CA or the CA 1965 do not impose the condition of obtaining the support of all creditors in order to remove a liquidator. The only condition stipulated in the provision was that the liquidator may be removed on 'cause shown'. In fact, the condition that all creditors and contributories must support an application for removal of a liquidator would make it difficult to honour the principle that a liquidator must act fairly and impartially in administering the liquidation. The essential complaint of the appellants was that the liquidator had acted unfairly by giving preference to TSLK, who was a creditor. Hence, it would not be reasonable to expect the appellants to obtain the support of TSLK to remove the liquidator. (paras 13-15)

**(3)** The liquidator maintained that he did not receive the proof of debt form on the reason that the appellants failed to supply the proof of payment and receipts, despite submitting the proof of debt form. However, the liquidator did not exhibit any letter that he might have sent to the appellants requesting for further evidence or any notice of rejection of proof of debt in the six-year period of liquidation in which he stated that he rejected the proof of debt of the appellants. Only in the instant application that the liquidator had, for the very first time, stated that he rejected the proof of debt of the appellants on the ground of insufficiency of evidence. Under r. 92 of the Companies (Winding-up) Rules 1972, the liquidator is obliged to examine and accept or reject the proof of debt in a prescribed form. Thus, the rejection of the proof of debt should not be kept up the sleeve of the liquidator and announced suddenly in proceedings launched for the purpose of his removal. Although the appellants admitted that they were not able to exhibit all the receipts for their investment of RM4,750,000 they had produced sufficient evidence to qualify at least as a contingent creditor for the purpose of this application. In the result, the appellants had the *locus standi* to file the instant application. (paras 16 & 17)

**(4)** The liquidator relied on the settlement agreement A, which was about the alleged debt due to TSLK from R2G for delivery of the machinery, as the basis of TSLK's claim to the machinery after it was wound up. Since TSLK elected to enforce their right to a liquidated debt under the settlement agreement A in the winding-up petition, they could not blow hot and cold by re-asserting an ownership claim to the machinery after R2G was wound up. Therefore, the claim of TSLK to the machinery was without legal basis and, in fact, unconscionable. Regardless of whether full payment had been made for its purchase, the liquidator's action in readily acceding to the patently unmeritorious claim of TSLK to the only valuable asset of the company, without notifying the other creditors, seriously called into question his impartiality and objectivity in the conduct of his duty. (para 28, 31 & 32)

**(5)** The liquidator was tardy and lackadaisical in recovering the monies of R2G. The accounts of the company showed that it operated three accounts, *ie*, HSBC, RHB Bank and Maybank. The liquidator only requested for the HSBC bank statement almost two years after the date of the winding up of R2G. Thus, it was apparent that the liquidator did not act expeditiously in seeking to investigate and ascertain the assets of the company. The action of the liquidator in not recognising the status of the appellants and not notifying them of his rejection of their proof of debt and improperly surrendering a valuable asset to an unsecured creditor had cast a serious doubt on his impartiality. The failings on the part of the liquidator were not mere human errors made in good faith but were serious errors of judgment that very likely prevented honest administration of the liquidation. (paras 33 & 35)

**Case(s) referred to:**

*Commissioner for Corporate Affairs v. Peter William Harvey [1980] VR 669* ***(refd)***

*Kao Che Jen v. N Chanthiran Nagappan [2015] 9 CLJ 295 CA* ***(refd)***

*Ng Yok Gee & Anor v. CTI Leather Sdn Bhd; Metro Brilliant Sdn Bhd & Ors (Interveners) [2006] 3 CLJ 360 HC* ***(refd)***

*Safuan Group Bhd v. Jambulingam Sethuraman Raki c/o Rimbun Corporate Advisory Sdn Bhd [2010] 1 LNS 1703 HC* ***(refd)***

*Shencourt Sdn Bhd v. Shencourt Properties Sdn Bhd [2019] 3 CLJ 791 CA* ***(refd)***

*Wong Sin Fan & Ors v. Ng Peak Yam & Anor [2013] 3 CLJ 17 FC* ***(not foll)***

*Yeo Ann Kiat & Ors v. Hong Leong Bank Bhd & Anor [2016] 9 CLJ 207 CA* ***(refd)***

**Legislation referred to:**

Companies Act 1965, ss. 218, 232(1), 266

Companies Act 2016, s. 482(b)

Companies (Winding-up) Rules 1972, rr. 92, 93, 173

*For the appellants - Mak Lin Kum, Simrenjeet Singh Baldev Singh & Mohamed Izzul Faris Mohd Ghani; M/s Simrenjeet, Tay & Co*

*For the respondent - Muhammad Toriq Abd Manaf & Muhammad Nazrin Mohd Seth; M/s Toriq Seth & Partners*

*[Editor's note: Appeal from High Court, Kuala Lumpur; Companies (Winding-up) Nos: WA-28PW-591-12-2018 & 28NCC-585-07-2012 (overruled).]*

*Reported by S Barathi*

## JUDGMENT

**Ravinthran Paramaguru JCA:**

### Introduction

**[1]** This is an appeal against the dismissal of the appellants' application to remove the liquidator of a company that had been wound up. The learned High Court Judge did not hear the application on the merits but dismissed it on the sole ground that the appellants who claimed to be creditors failed to get the support of the other creditors.

**Brief Background Facts**

**[2]** The appellants in this case are Jagdis Singh a/l Banta Singh and Marvellous Existence Sdn Bhd. They filed an application under s. 482(b) of the Companies Act 2016 to remove Mr Augustine a/l T K James as the liquidator of Return 2 Green Sdn Bhd. The company was wound up on 14 September 2012 at the instance of TSLK Enterprise Sdn Bhd ("TSLK"). The crucial claims in the affidavits to support the application are as follows.

**[3]** The first claim of the appellants is that they are creditors of Return 2 Green Sdn Bhd. The following facts were averred in the affidavit-in-support filed by Jagdis Singh a/l Banta Singh. He said that in 2010, Ramaness a/l Parasuraman who was a director of Return 2 Green Sdn Bhd asked him to avail an investment opportunity in the company. In taking up the offer, Jagdis Singh a/l Banta Singh and his brother in law, one Dr Gurnam Singh paid a total of RM4,750,000 through Marvellous Existence Sdn Bhd to Return 2 Green Sdn Bhd and/or to Ramaness. Jagdis Singh a/l Banta Singh averred that Ramaness or Return 2 Green Sdn Bhd acknowledged the payments through issuance of 990,000 shares to 13 individuals including himself. Ramaness also caused Return 2 Green Sdn Bhd to prepare an agreement to acknowledge that a sum of RM3,500,000 is owed to the appellants. However, the agreement was not signed by the appellants as they maintained that the actual sum owing was RM4,750,000.

**[4]** Counsel for the appellants also referred to the receipts issued by Return 2 Green Sdn Bhd for various sums received from Jagdis Singh a/l Banta Singh and Dr Gurnam Singh as evidence of the status of the appellants as creditors. In addition, counsel for the appellants submitted that the liquidator failed to exhibit any evidence to rebut their proof of payment. The liquidator also failed to issue a letter to reject the appellants' proof of debt.

**[5]** The second claim of the appellants is that the liquidation was not being conducted fairly with a view of recovery of the assets of the company for the benefit of its creditors. Instead, the liquidator acted to assist TSLK to gain control of the only valuable asset of the company which is machinery. The affidavit evidence and submission of the parties on this point will be discussed in some detail in the latter part of this judgment.

**Issues In The Appeal**

**[6]** As we said earlier, the learned High Court Judge did not deal with the merits of the application to remove the liquidator. He also did not deal with the issue whether the appellants were creditors. The application was dismissed on the ground that other creditors and contributories did not support it. Before us, counsel for the appellants argued that the support of other creditors and contributors is not a mandatory requirement in an application to remove a liquidator. He urged us to consider the merits of the application and grant the application to remove the liquidator. At the outset

of the hearing, counsel for the liquidator also raised a preliminary objection to the appeal. He submitted leave of court was not obtained for the application to remove the liquidator. Thus, the main issues in this appeal would be:

(i) Whether leave of court is required for removal of liquidator?

(ii) Whether support of all creditors and contributories is obligatory?

(iii) Whether the appellants are creditors?

(iv) Whether cause shown on the merits for removal of creditor?

**Leave Of Court**

**[7]** The application to remove the liquidator was made under s. 482(b) of the Companies Act 2016. The provision reads as follows:

> A liquidator or interim liquidator appointed by the Court may:
>
> (a) resign from office in accordance with the rules; or
>
> (b) on cause shown, be removed from office by the Court.

**[8]** Section 482(b) of the Companies Act 2016 is similar to s. 232(1) and s. 266 of the repealed Companies Act 1965. The said provisions read as follows:

> 232(1). A liquidator appointed by the Court may resign or on cause shown be removed by the Court.
>
> 266. The Court may, on cause shown, remove a liquidator and appoint another liquidator.

**[9]** It must be noted that the pre-requisite of prior leave of court is not stipulated by all the above-mentioned statutory provisions. The issue whether leave of court is required for an application to remove a court-appointed liquidator is not without judicial precedent. It suffices if we cite two cases decided by this court. In *Kao Che Jen v. N Chanthiran Nagappan* [2015] 9 CLJ 295, an application was filed to remove the court-appointed liquidator under s. 232(1) of the Companies Act 1965. One of the issues that arose for determination was whether s. 232(1), when properly construed, required prior leave of court to be obtained before an application to remove the liquidator could be made. Idrus Harun JCA (as he then was), speaking for the Court of Appeal, answered the question in the negative and said as follows:

> [25] The learned judge in fact, had completely failed to direct her mind to the legislative intent of s. 232(1) of the Act in order to try to get at the real intention of the Legislature and in consequence she omitted to consider the section and its relation to the general object intended to be secured by it. In our judgment, s. 232(1) contains and **only contains one relevant requirement** so far as it relates to an application for removal of a liquidator in that the power conferred on the court is exercisable by it

in that behalf only on cause shown by the applicant, which necessarily calls for sufficient material or evidence before the court that would establish or suggest that there is cause to have the liquidator removed. It must be borne in mind that the removal of liquidator is expressly stated by law to be by the court which follows therefore that the legislative intent of s. 232(1) is to confer specific power to the court to remove the liquidator and **impose on it the duty to exercise the said power only on cause shown**. (emphasis added)

**[10]** This court, in the more recent decision of *Shencourt Sdn Bhd v. Shencourt Properties Sdn Bhd* [2019] 3 CLJ 791 had occasion to re-affirm the decision in the above-mentioned case on the issue whether prior leave of court is required for the removal of a liquidator under s. 482(b) of the Companies Act 2016. In the premises, we are of the view that the preliminary objection is without merit.

**Support Of All Creditors And Contributories**

**[11]** As we said earlier, the learned High Court Judge dismissed the application of the appellants on the sole ground that they failed to obtain the support of all the creditors. His Lordship came to this conclusion upon being referred by counsel for the liquidator to the Federal Court case of *Wong Sin Fan & Ors v. Ng Peak Yam & Anor* [2013] 3 CLJ 17; [2013] 2 MLJ 629. In that case, Zulkefli Makinudin CJ (Malaya) in considering the principles that govern the removal of a liquidator cited with approval the judgment of the High Court in the case *Ng Yok Gee & Anor v. CTI Leather Sdn Bhd; Metro Brilliant Sdn Bhd & Ors (Interveners)* [2006] 3 CLJ 360; [2006] 7 MLJ 28 and said as follows:

(a) The court does not have an unfettered discretion, as cause must be shown before a liquidator can be removed. The position is not the same as it is when a liquidator is first appointed and the court may choose between two or more competing candidates.

(b) The normal grounds for removal are that the liquidator has a personal unfitness, has failed to act impartially or is in a position where his duty and interest are in conflict.

(c) The removal of the liquidator must be in the interest of all those who are interested in the company being liquidated. **Thus, all the contributories and creditors of the company being liquidated must support such application to remove the liquidator**. (emphasis added)

**[12]** Counsel for the liquidator latched on-to the last sentence in para. (c) above and canvassed the novel argument that "all contributories and creditors" must support an application to remove a liquidator. The learned High Court Judge accepted the said argument for the reason that a statement to that effect was found in the judgment of the apex court. His Lordship held that the "condition" of obtaining the support of all the creditors was not

satisfied in the instant case by the appellants. With respect, we are of the unanimous opinion that the High Court Judge erred in imposing the said condition on the appellants. Our reasons are as follows.

**[13]** Section 482(b) of the Companies Act 2016 or its predecessor provisions in the Companies Act 1965 do not impose the condition in question. The only condition stipulated in these provisions was that a liquidator may be removed on "cause shown". The fact that this was the sole condition in s. 232(1) of the Companies Act 1965 was highlighted in *Kao Che Jen v. N Chanthiran Nagappan* (*supra*) by Idrus Harun JCA in the passage that we quoted earlier. In fact, the relevant passage in *Ng Yok Gee & Anor v. CTI Leather Sdn Bhd (Metro Brilliant Sdn Bhd & Ors (Interveners))* (*supra*) which was summarised and restated in *Wong Sin Fan & Ors v. Ng Peak Yam & Anor* (*supra*) does not mention the condition that all creditors or contributories must support the application. It only states that all creditors must be notified of the application and that the removal of the liquidator must be for the benefit of all creditors.

**[14]** We also note that whether the support of all creditors is a mandatory condition for removal of the liquidator was not an issue that arose for determination in *Wong Sin Fan & Ors v Ng Peak Yam & Anor* (*supra*). The issue in the said case was whether r. 173 of the Companies (Winding-up) Rules 1972 only applied in respect of services rendered in the course of assisting the liquidator in the ordinary administrative and management duties of the liquidators. It was held that the service of an advocate in the oppression suit did not fall under it. Thus, the statement in *Wong Sin Fan & Ors v. Ng Peak Yam & Anor* (*supra*) that the support of all creditors is a requirement in an application to remove a liquidator is a passing statement or an *obiter dictum*. We are mindful that some *obiters*, especially one from the apex court, are highly persuasive and are entitled to greater weight though not binding. In our respectful view, the condition that all creditors and contributories must support an application for removal of a liquidator would make it difficult to honour the principle that a liquidator must act fairly and impartially in administering the liquidation. This is because, in cases where the complaint is that the liquidator had given preference to one set of creditors over others, it is unlikely that all creditors would be on common ground in respect of the application to remove the liquidator. Furthermore, in cases involving liquidation of public companies, as submitted by counsel for the appellants there could be thousands of creditors and contributories and thus it would not be practical to obtain consent from each one of them for the purpose of the application to remove the liquidator.

**[15]** In the instant case, the essential complaint of the appellants is that the liquidator had acted unfairly by giving preference to TSLK who is a creditor. In the circumstances, it would not be reasonable to expect the appellants to obtain the support of TSLK to remove the liquidator. Therefore, to conclude

this issue, with the greatest of respect, we are of the view that the passing statement in question in *Wong Sin Fan & Ors v. Ng Peak Yam & Anor* (*supra*) should not be acted upon lest it results in the law taking a wrong turn which will render s. 482(b) of the Companies Act 2016 unworkable. We therefore find that the learned High Court Judge erred in dismissing the application without considering it on the merits. It befalls us now to consider the application on the merits.

**Whether Appellants Are Creditors?**

**[16]** We referred to the affidavit evidence of the appellants on this issue earlier. The appellants claimed that they invested RM4,750,000 in Return 2 Green Sdn Bhd. Proof of payments totalling RM4,135,000 was exhibited. The agreement in which Return 2 Green Sdn Bhd acknowledged receiving the said amounts was also exhibited. It was not signed by the appellants and Dr Gurnam Singh but it was signed by a representative of the Return 2 Green Sdn Bhd. The appellants duly filed their proof of debt in the statutory form. The response of the liquidator is found in para. 15 of his affidavit-in-opposition. He admitted receiving the proof of debt forms from the appellants but said that proof of payment and receipts had not been supplied. For that reason, he maintained that he did not receive the proof of debt. However, the liquidator did not exhibit any letter that he might have sent to the appellants requesting further evidence. In the proof of debt forms exhibited by the liquidator himself, there are several attached receipts from Return 2 Green Sdn Bhd acknowledging payments of large sums that were received from Jagdis Singh a/l Banta Singh and Dr Gurnam Singh. The liquidator did not exhibit any notice of rejection of proof of debt either in the six-year period of liquidation in which he stated that he rejected the proof of debt of the appellants. Thus, as pointed out by counsel for the appellants, it appears that only in the instant application, the liquidator has for the very first time stated that he rejected the proof of debt of the appellants on the ground of insufficiency of evidence. Under r. 92 of the Companies (Winding-up) Rules 1972, the liquidator is obliged to examine and accept or reject the proof of debt in a prescribed form. Rule 92 reads as follows:

> **Examination Of Proof 92**
>
> The liquidator shall examine every proof of debt lodged with him and the grounds of the debt, and shall in writing admit or reject it, in whole or in part, or require further evidence in support of it. If he rejects a proof he shall state in writing in Form 59 to the creditor the grounds of the rejection.

**[17]** Thus, the rejection of proof of debt should have not been kept up the sleeve of the liquidator and announced suddenly in proceedings launched for the purpose of his removal. Otherwise, an aggrieved creditor will not be able to challenge the decision of the liquidator in court within the prescribed time under r. 93. Although the appellants admitted that they were not able exhibit

all the receipts for their investment of RM4,750,000, they had produced sufficient evidence to qualify at least as a contingent creditor for the purpose of this application. In the result, having satisfied ourselves that the appellants have *locus standi* to file the instant application, we move on to consider the final major issue, ie, whether they have shown cause for the removal of the liquidator.

**Whether Cause Shown?**

**[18]** We shall now turn to the arguments of the parties in the instant case. The argument of the appellants may be summarised as follows. Return 2 Green Sdn Bhd was wound up at the instance of TSLK over alleged failure to pay RM8,994,484.71 which is stated as an "undisputed debt" in the winding-up petition. TSLK had allegedly paid RM12,100,000 for machinery delivered to Return 2 Green Sdn Bhd. On 19 April 2012, TSLK served Return 2 Green Sdn Bhd, a s. 218 of the Companies Act 1965 notice. Subsequently, Return 2 Green Sdn Bhd entered into a settlement agreement (referred to as settlement agreement A in the submissions of the appellants) on 26 April 2012 in which the company admitted owing RM8,994,484.71. There were two other subsequent settlement agreements which remained unsigned which are referred to as settlement agreements B and C. One of the terms of settlement agreement A required Return 2 Green Sdn Bhd to return the machinery to TSLK and if it cannot do so, it was agreed that the sum of RM8,994,484.71 shall constitute an undisputed debt. When Return 2 Green Sdn Bhd failed to return the machinery and failed pay the said sum of RM8,994,484.71, TSLK applied for the company to be wound up.

**[19]** The appellants' case is that there was no proper invoice for the machinery and no other proof of payment. Furthermore, settlement agreement A was entered into by Return 2 Green Sdn Bhd and TSLK within six months of the winding up and is therefore voidable. The machinery was the most valuable asset of the Return 2 Green Sdn Bhd. However, without notifying other creditors, the liquidator hurriedly filed an *ex parte* application in court to surrender the machinery to TSLK and therefore gave TSLK preferential treatment. Furthermore, the liquidator failed to diligently investigate the affairs of Return 2 Green Sdn Bhd and collect a total of RM9 million which includes the value of the machinery in question. The appellants deposed in the affidavit-in-support that the following assets could have been recovered if the liquidator had acted in the best interest of the liquidation with diligence and due despatch:

(i) RM816,000 in Return 2 Green Sdn Bhd's HSBC account which was transferred to the Maybank account;

(ii) machinery valued at RM7 million;

(iii) bank guarantee in the sum of RM340,000 which is recorded in the audited accounts;

(iv) monetary bonds given to the Customs Department in the sum of RM1,500,000; and.

(v) sum paid out of HSBC account to directors of Return 2 Green Sdn Bhd.

**[20]** Counsel for the appellants submitted that in the entire six-year period since the appointment of the liquidator up to the time of the instant application, not much had been done to recover the assets of Return 2 Green Sdn Bhd for the benefit of the other creditors except TSLK which managed to gain valuable machinery worth RM7 million on the strength of a claim of ownership without evidence. Furthermore, TSLK had issued a s. 218 of the Companies Act 1965 notice for the alleged debt and therefore was not a secured creditor. For that reason, the liquidator should have not made an application to surrender the most valuable asset of the Return 2 Green Sdn Bhd without notifying any of the other creditors who had a right to *pari passu* distribution of the assets. Furthermore, the argument of the liquidator that the machinery was an "onerous property" was questionable. Counsel for the appellants submitted that any reasonable and impartial liquidator would have asked several important questions in respect of settlement agreement A. The value of the machinery stated in the customs declaration form on or about 9 December 2009 was RM3,587,916.35 and RM2,000,000 when it was taken out of the free trade zone in May 2013. Settlement agreement A did not refer to any invoice about sale price from TSLK to Return 2 Green Sdn Bhd. The liquidator did not ascertain this fact from the books and records of Return 2 Green Sdn Bhd. Only an invoice evidencing sale from IP Sung Ltd to TSLK for the sum of USD4,187,717 was produced by the liquidator. And the liquidator never produced any invoice evidencing sale of the machinery by TSLK to Return 2 Green Sdn Bhd.

**[21]** The reply of the liquidator in the affidavit and the submissions may be summarised as follows. In respect of the criticism that the machinery in question that was improperly surrendered to TSLK, the liquidator averred that although the audit report of the company stated that the machinery belonged to the company, there was no description of the machinery. Therefore, the audit report did not necessarily refer to the machinery in question. The liquidator also submitted that the machinery was released to TSLK because it was onerous property in that:

(i) ownership was claimed by TSLK;

(ii) the machinery was subject to distress action by the landlord because of arrears of rental totalling RM527,600.

(iii) delay will result in paying further rental of RM96,000 and RM14,400 for security guard.

**[22]** In respect of the allegation of the appellants that there was failure to trace and recover the assets of the company, the liquidator averred as follows. He said that upon appointment, he sent out letters to the banks to determine the bank balance of the company. Only RHB Bank and Alliance Bank responded. He came to know of the HSBC account two years later on 12 March 2014. Upon realising that the sum of RM816,000 was transferred to the Maybank account, he requested for details from Maybank. In respect of the allegation that the bonds given to the Customs Department were not liquidated, the liquidator averred that the bonds were not backed by monetary deposits. In respect of the bank guarantee of RM340,000 stated in the financial statement, the liquidator stated that he has written to all the banks inquiring about it. In respect of the claim of the appellants that the directors of Return 2 Green Sdn Bhd were not investigated, the liquidator averred that there were insufficient funds for legal action to be taken against them and that none of the creditors produced evidence of wrongdoings on their part.

**[23]** In considering whether the appellants have shown cause for removal of the liquidator we shall first refer to the non-exhaustive common grounds that must be proved before a liquidator can be removed. It is trite law as stated in *Wong Sin Fan & Ors v. Ng Peak Yam & Anor* (*supra*) that the discretion of the court to remove a liquidator is not unfettered. In *Yeo Ann Kiat & Ors v. Hong Leong Bank Bhd & Anor* [2016] 9 CLJ 207, Vernon Ong Lam Kiat JCA speaking for the Court of Appeal emphasised the interests of the liquidation. His Lordship said as follows:

> [24] In most instances, the common grounds advanced to justify the court in removing a liquidator are (i) the liquidator's personal unfitness; and/or (ii) the liquidator's personal misconduct. Be that as it may, we do not think that the power of removal under sub-s. 232(1) is confined to that. The court has the power to remove a liquidator if the court is satisfied on the evidence that it is in the interest of the liquidation that he should be replaced; by that we mean all those who are interested in the company being liquidated (*Chua Boon Chin v. JM McCormack & Ors* [1978] 1 LNS 33; [1979] 2 MLJ 156 (High Court, Singapore) at p. 158 per D'Cotta J; *Re Adam Eyton, Limited Ex p Charlesworth* [1887] 36 Ch D 299, at pp. 303-304 per Cotton LJ). Indeed, it has been said that the measure of due cause is the substantial and real interest of the liquidation (*Re Adam Eyton Limited* (*supra*) at p. 306 per Lord Bowen).

**[24]** In respect of the duties of a liquidator in a compulsory winding up, His Lordship quoted the following passage from the judgment of Marks J in the Australian case of *Commissioner for Corporate Affairs v. Peter William Harvey* [1980] VR 669:

> The duties of a liquidator need to be clearly understood. Fundamentally, he must administer the estate strictly in accordance with the duties and obligations specifically imposed on him by the Companies Act and its Rules. It is obvious that everything to be done in a competent

> administration is not and cannot be specifically prescribed. Preserving the assets, giving proper attention to the administration, **acting with due despatch** and ensuring adequate knowledge and understanding of the affairs of the companies are matters of common sense. If there is a difficulty at any stage of the administration then it is the clear duty of the liquidator to inform the Court and take directions.
>
> In a compulsory winding up his office stems from appointment by the Court. He is clearly not an employee of the Court but the nature of the appointment makes him a representative of it. As Street J said in *Duffy v. Super Centre Development Corp Ltd* [1967] 1 NSWR 382 at 383, the decisions the liquidator makes from time-to-time are in effect made under the authority of the Court itself. The winding up is by the Court, which for the purposes the liquidator is. As such he is entrusted with the reputation of the Court for impartial and proper despatch of duties. No lesser standard in that regard is to be expected of the liquidator than of a court of a judge.
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> When a winding up occurs, the financial outcome for creditors and contributories is dependent, amongst other things, on honest administration. It is the trust, which those persons are obliged to place in the liquidator to preserve the assets and act faithfully and fairly that defines the weight of the duties owed and the strictness with which his conduct must be considered by the Court.
>
> The law in the circumstances regards such duties as fiduciary, although clearly it will not interfere with *bona fide* exercise of discretion which are not beyond the acts or omissions of a reasonable person.
>
> (emphasis added)

**[25]** Thus, in the above-mentioned authorities, it is stated that quite apart from personal unfitness or misconduct, a liquidator can be removed on the grounds that he failed to conduct his office with due despatch and also on the general ground that it is in the interest of the liquidation.

**[26]** We shall now look at the uncontested facts to see whether they warrant the removal of the liquidator.

**[27]** The main issue raised by the appellants is the surrender of the valuable machinery in question to TSLK through an *ex parte* application filed in court on the ground that machinery belonged to TSLK under settlement agreement A. The other creditors of Return 2 Green Sdn Bhd including the appellants who had filed their proof of debt with the liquidator were not notified of the application. Counsel for the appellants submitted that the surrender of the machinery worth millions to TSLK whose entitlement to it was at best vaguely prevented the distribution of the proceeds of the liquidation to all unsecured creditors which also include TSLK on *pari passu* basis. We find much merit in this submission. Our reasons are as follows.

**[28]** Settlement agreement A is about the alleged debt that is due to TSLK from Return 2 Green Sdn Bhd for delivery of the machinery in question. The agreement is disputed by the appellants on the ground that the representatives of Return 2 Green Sdn Bhd had no authority to execute the said agreement. It was this agreement that was relied upon by the liquidator as the basis of the claim of TSLK to the machinery after it was wound up. In settlement agreement A, Return 2 Green Sdn Bhd and TSLK agreed that the machinery was purchased by the latter for RM14,411,801.75. In respect of the amount allegedly owing to Return 2 Green Sdn Bhd, TSLK took the position that it owed RM12,100,000. On the other hand, Return 2 Green Sdn Bhd admitted to owing only RM8,994,484.71. The parties also agreed to settle the "differential sum" of RM3,105,515.29 within 14 days. It was also provided in settlement agreement A that failure to settle the "differential sum" shall not affect the agreement. It is odd that the parties adopted differing positions on the outstanding debt in a so-called settlement agreement. Nonetheless, cl. (2) and cl. (7) of the settlement agreement have a crucial bearing to the instant application.

**[29]** Clauses (2) and (7) of the settlement agreement read as follows:

> 2. Upon the execution of this Agreement, R2G shall immediately return the possession of the Machineries to TSLK in good working condition, ordinary wear and tear excluded.
>
> 7. In the event R2G shall for whatsoever reason fail to deliver the Machineries to TSLK within Twenty Four (24) hours upon execution of this Agreement, the outstanding sum of not less than RM8,994,484.71 and not more than RM12,100,000.00 (their difference to be resolved and determined as recited above) is hereby acknowledged as an undisputed debt with interest accruing at 8% from the date of this Agreement until full settlement provided that TSLK may, only in writing, unilaterally elect at any time hereafter to confirm the said sum of RM8,994,484.71 as an undisputed debt without prejudice to TSLK's exercise of TSLK's right referred to in recital D above.

**[30]** Even if, contrary to the position taken by the appellants, the settlement agreement A is valid, the important point to note is that Return 2 Green Sdn Bhd failed to return the machinery to TSLK. Therefore, by the operation of cl. 7, Return 2 Green Sdn Bhd had acknowledged an "undisputed debt" in the sum of RM8,994,484.71 to TSLK. Return 2 Green Sdn Bhd was wound up pursuant to a s. 218 of the Companies Act 1965 notice and petition filed by TSLK upon failure to satisfy the debt owed to it under the terms of settlement agreement A. Thus, the only claim of TSLK in the liquidation is the claim for the unsecured debt. It is not a debt that is secured by a charge, debenture or any other instrument. Therefore, TSLK stood in no better position than other unsecured creditors such as the appellants in respect of the assets of Return 2 Green Sdn Bhd including the machinery in question when the winding-up order was made.

**[31]** However, the liquidator took the position that the machinery which was the only valuable asset of Return 2 Green Sdn Bhd must be surrendered to TSLK because they laid an ownership claim to it. The claim of TSLK was based on settlement agreement A and the invoice from IP Sung Ltd to TSLK which evidenced purchase of the machinery by the latter. However, both documents do not support the claim of ownership by TSLK at the time of the winding up. The recitals to the settlement agreement A states that TSLK had previously "supplied" the machinery to Return 2 Green Sdn Bhd for the sum of RM14,411,801.75 and that TSLK had received part payment. Return 2 Green Sdn Bhd also took possession of the machinery. Thus, it is implied in Settlement Agreement A, the machinery was sold to Return 2 Green Sdn Bhd by TSLK and therefore title had passed. The invoice of IP Sung Ltd is only evidence that TSLK was the original purchaser of the machinery. It is not evidence that TSLK was still the owner of the machinery. In fact, under cl. 7 that we reproduced earlier, a liquidated debt in the sum of RM8,994,484.71 had come into existence in favour of TSLK as Return 2 Green Sdn Bhd failed to return the machinery as per cl. 2. And this very amount was the petitioned debt in the winding-up proceedings. In the premises, the claim for ownership of the machinery by TSLK is inconsistent with its action in issuing a s. 218 notice for the liquidated debt under settlement agreement A for failure on the part of Return 2 Green Sdn Bhd to return the same machinery.

**[32]** To reiterate the essential issue here, since TSLK elected to enforce their right to a liquidated debt under settlement agreement A in the winding-up petition, they cannot blow hot and cold by re-asserting an ownership claim to the machinery after Return 2 Green Sdn Bhd was wound up. Therefore, regardless of the disputed facts pertaining to other issues, including the unsigned subsequent settlement agreements, we agree with the argument of counsel for the appellants that as an unsecured creditor, the claim of TSLK to the machinery was without legal basis and in fact, unconscionable. It must also be noted that the machinery was also included as an asset of the company in the audited accounts which was available to the liquidator. Regardless of whether full payment had been made for its purchase, the liquidator's action in readily acceding to the patently unmeritorious claim of TSLK to the only valuable asset of the company without notifying the other creditors seriously calls into question his impartiality and objectivity in the conduct of his duty.

**[33]** We find that there is also merit in the argument of the appellants that the liquidator was tardy and lackadaisical in recovering the monies of Return 2 Green Sdn Bhd. The accounts of the company show that it operated three accounts, ie, HSBC, RHB Bank and Maybank. Return 2 Green Sdn Bhd was wound up on 14 September 2012. The liquidator only requested for the HSBC bank statement almost two years after date of the winding up. The liquidator stated in his affidavit that he discovered the existence of the

account only in 2014. However, his letter to all banks in the country inquiring of the existence of bank accounts is dated 3 April 2014. Thus, it is apparent that the liquidator did not act expeditiously in seeking to investigate and ascertain the assets of the company. The HSBC statement shows that RM816,000 was transferred from the HSBC account on 28 May 2012 to the Maybank account. The liquidator said in the affidavit-in-opposition that was affirmed seven years after his appointment that the matter was still being "looked into". The HSBC statement also shows payments made to third parties after the winding up. The glaring delay in assiduously pursuing a proper search and inquiry into the accounts of the company with local banks could have seriously impacted the asset recovery process for the benefit of creditors. The explanations in the affidavit-in-reply of the liquidator that some banks did not give a reply or that he was not aware of the existence of the accounts do not appear credible. As liquidator, he could have secured all the books of the company and made pointed inquiries into the monies in local bank accounts. Similarly, the explanations of the liquidator for not enquiring into the bank guarantees and the bonds given to the Customs Department that could have been liquidated for the benefit of the creditors do not appear plausible. The liquidator stated that he inquired with the banks but they did not acknowledge the existence of the guarantees. However, letters from the banks were not exhibited. The liquidator took the position that the bonds given to the Customs Department are not monetary bonds. He said in the affidavit-in-reply that the bonds were only backed by an undertaking. However, the appellants referred to a letter from the solicitor of the liquidator demanding for the return of RM1.5 million. The liquidator had no real answer why his own solicitor should demand the return of the bond sum of RM1.5 million from the Customs Department if the bonds were as non-monetary deposits.

**[34]** We are mindful of the passage in *Wong Sin Fan & Ors v. Ng Peak Yam & Anor* (*supra*) that says that fair play to liquidator is not to be left out of sight where there are no assets which can be imperilled by the continuance in office of the liquidator. We also took note of the passage in *Safuan Group Bhd v. Jambulingam Sethuraman Raki c/o Rimbun Corporate Advisory Sdn Bhd* [2010] 1 LNS 1703, which was quoted to us by counsel for liquidator where Mary Lim J (as she then was) said as follows:

> 16. I am also reminded that liquidators are not infallible but are human, just like each one of us. What is important is that the failure or the error complained of are not dishonest, deliberate but made in good faith and have not seriously prejudiced the liquidation of the company - *Procam (Pte) Ltd v. Charles Jocelyn Tichborne Nangle & Anor* [1990] 4 MTC 208.

**[35]** However, as we pointed out earlier, the action of the liquidator in not recognising the status of the appellants and not notifying them of his rejection of their proof of debt and improperly surrendering a valuable asset to an unsecured creditor has cast a serious doubt on his impartiality. His failure

to act expeditiously to recover the other assets in question for a long time had called into question his competence and fitness to administer the liquidation. We are of the view that the failings on the part of the liquidator that were pointed out by the appellants are not mere human errors made in good faith but are serious errors of judgment that very likely prevented honest administration of the liquidation.

**[36]** For all the above reasons, the appeal is allowed and the order of the High Court is set aside with costs of RM20,000 here and below which shall be subject to allocatur.